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United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 319.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL.,
Appellants,
vs.
W. N. COLER & COMPANY,
Appellees.

Brief of Appellees on Final Hearing.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
CHARLES PRICE,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Street, N. Y.

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This case stands for argument upon the whole record, including the answers by the Supreme Court of the United States to the certified questions.

The decision is reported in the 180th Volume, U. S. Reports, page 506.

The Court gave limited answers to the questions, in substance as follows :

1. That the Circuit Court should have regarded the decisions set out in the questions as controlling upon the inquiry, whether the legislative enactments of 1868,

1879 and 1881 were passed in such manner as to become, under the Constitution, laws of the State.

2. That the rights of the parties in this case are determinable by the law of the State, as it was declared by the State Court to be at the time the bonds here involved were made in the name of the County and put upon the market.

We have read carefully the opinion of the Supreme Court of the United States, delivered by Mr. Justice HARLAN, in *Wilkes County vs. Coler*, 180 U. S., 506. The Court answers the questions only to a certain extent, but not fully as certified, and is careful to state it (see p. 533). We understand that the opinion and the answers given to the questions reserve from their operation and effect the question whether the Convention ordinence of 1868 did not itself, aside from and independent of the legislation of 1868, 1879 and 1881, give full power and authority to Wilkes county to issue the bonds in question. The Supreme Court distinctly stated that the said ordinance of March 9, 1868, was valid, and was in force after the constitution was adopted, and that the Supreme Court of North Carolina had so held in the *Hill* and *Belo* cases. This settles the objection so much urged on the other side, based on certain decisions or dicta of the Supreme Court of North Carolina that all unexecuted powers were annulled by the constitution when it went into effect. Mr. Justice HARLAN expressly stated that the *Belo* case held that the said Ordinance of March 9, 1868, conferred the authority upon *Forsyth county* to make the subscription, and that this was so independently of the act of August, 1868, or of any other legislation (p. 529).

The Supreme Court says at page 529 :

" Forsyth County—whose liability on the bonds in suit in that case was directly involved—made the point

that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the Convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the North Western North Carolina Railroad Company were upheld as valid *under that ordinance*, which was recognized as part of the law of the State and as conferring authority on the county of Forsyth to do what it did.

"It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the North Western North Carolina Railroad Company, was not superseded by the constitution of 1868, but was *in force* and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds, just as Forsyth County had done."

As to *Wilkes county*, he states the question to be as follows, to wit (p. 529):

"Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county,"

which question he states "is not now decided." On page 532 he says:

"Was Wilkes county in the same category with Forsyth county?"

In short, if Wilkes county is in the same category with Forsyth county, then it stands decided by the Supreme Court of the United States that the said Ordinance of 1868 does, *per se*, give to Wilkes county the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879 and 1881, so that the only question now is whether Wilkes county is in the same category with Forsyth county. If so, then the answer of the Supreme Court to the second question applies, which is that the rights of the parties in the Wilkes county case are determinable by the law of

the state as it was decided by the state court to be at the time when the Wilkes county bonds were put upon the market. It results, therefore, that, if Wilkes county is in the same category with Forsyth county, the question is conclusively decided in our favor by the late opinion of the Supreme Court of the United States, without anything more, and the Circuit Court of Appeals should affirm the judgment of the Circuit Court in the Wilkes county case.

There is no doubt that Wilkes county and Forsyth county are in the same category.

I.

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to Incorporate the Northwestern North Carolina Railroad Company," gave, per se, clear and complete authority to the County of Wilkes to issue the bonds in question, and this proposition was twice expressly decided by the Supreme Court of North Carolina before the said bonds were issued.

The Constitutional Convention of the State of North Carolina enacted an ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868, printed in the record in this case, pages 12 to 15. This ordinance provided in section one:

"That, for the purpose of constructing a railroad of one or more tracks, from some point on the North

Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years," etc.

Section 2 of the said ordinance provided:

"Be it further ordained, That the capital stock of said company may be created by subscriptions on the part of individuals, corporations *and* COUNTIES, in shares of one hundred dollars."

Section 12 of the said ordinance provided:

"Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all *counties* or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"The act incorporating the North Carolina and Atlantic Railroad Company," referred to in the said section 12 of the said ordinance, is the act, chapter 136, of the laws of North Carolina, session of 1852, sections 33 to 37 of which are printed in the record (pp. 66, 67), and said sections 33 to 37 are by such reference adopted and made part of said ordinance. These sections there quoted are the only material and pertinent sections of the said act of 1852, and are the only sections thereof which relate to county or municipal subscriptions.

Section 33 of the said act of 1852 provides :

"It shall be lawful for *any incorporated town or county, near or through which said railroad may pass*, to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided" (Record, p. 31).

The language of section 2 of the ordinance above quoted is general—that "the capital stock of said company may be created by subscriptions on the part of individuals, corporations and *counties*." So also the language of section 12 of said ordinance is general —"*all* counties or towns subscribing stock." The said section 2 and the said section 12, if standing alone, would clearly include counties generally. The said section 33 of the act of 1852 provides that "it shall be lawful for *any incorporated town or county, near or through which said railroad may pass*." If this operates in any way to restrict the otherwise general language of the said sections 2 and 12 in the ordinance of 1868, it is, nevertheless, perfectly clear that the county of Wilkes is embraced within the language of said section 33.

A glance at the map of the state of North Carolina shows that a railroad constructed "from some point on the North Carolina Railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state," must necessarily pass "near or through" Wilkes county.

The demonstration, therefore, is complete, that the said ordinance of the Constitutional Convention of

1868 expressly authorized the county of Wilkes to subscribe for stock in the said railroad company. It is also perfectly clear that the said county of Wilkes was authorized by the said ordinance of 1868, and by the said act of 1852, which was referred to in section 12 of said ordinance, to issue under the sanction of a popular vote, bonds of the county in payment of such subscription to said stock. Section 34 of the said act of 1852 provides that the justices of peace of the county may make an order for an election of the qualified voters of the county. Section 35 of said act of 1852 provides:

"That if, upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question, are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscriptton in behalf of such town and county, to be *paid for in the bonds of such town and county*, and on such time as shall be agreed on by said town officers and the justices of such county" (Record, p. 32).

The language of section 12 of the said ordinance is "that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." The method of making the subscription, the method of paying such subscription—namely, in the bonds of such county—and all the other things in the said act of 1852 relating to the method of making the said subscription and paying the said subscription are, by this reference, incorporated into, and are a part of, the said ordinance of 1868. The method of paying said

subscription—namely, by the bonds of the county—is as much a part of the said ordinance as are the other provisions of the act of 1852 in regard to the making of the said subscription. It was so held, prior to the issue of the bonds now in suit, by the Supreme Court of North Carolina in the two *Forsyth County cases* of *Hill* and *Belo* below cited. No other method of paying the said subscription is provided for, either in the said ordinance or in the said act of 1852. Such a construction must be placed upon the ordinance and act as will render them effective and not nugatory.

The bonds in suit were duly authorized by a vote of the majority of the qualified voters of Wilkes County.

The said bonds now in controversy recite that they are

" authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the sixth day of November, A. D. 1888, and by an order of the Board of Commissioners of Wilkes county [the said Board of Commissioners having conferred upon them, under the constitution of 1868 and the code of North Carolina, the same power which the justices of the peace formerly had] made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes " (Record, p. 24).

The complaint in the present case alleges (Record, p. 7, paragraph 22) :

" That the county of Wilkes, acting through its Board of Comissioners, and in accordance with the ordinance and acts as above set out, subscribed the sum of $100,000 to the capital stock of the North western North Carolina Railroad Company, a proposi-

tion to subscribe the said amount having been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same."

The answer of the county commissioners (Record, p. 32, paragraph 22) avers:

"These respondents, still denying the authority of the former commissioners to issue bonds or subscribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote."

The Railroad was actually constructed in Wilkes County.

It is also stated in the complaint (Record, p. 8, paragraph 23) that the said railroad was constructed in the said county of Wilkes, "and is the only one running within the limits of the county, and has been taxed by the county each and every year since its construction." The answer of the county commissioners (Record, p. 33, paragraph 23) also admits the completion of the said railroad to Wilkesboro, in the said county of Wilkes.

We have thus shown that even if this were an original proposition, which had never been passed upon by the Supreme Court of North Carolina, the said ordinance of 1868, standing by itself alone, was and is, *per se*, sufficient authority for the issue of these bonds of Wilkes county. It is not pretended or alleged by anybody that there is any act of the legislature repealing, or attempting to repeal, the said ordinance.

But we do not need to depend upon showing the correctness of this proposition as an original question. The point has been expressly adjudged by the Supreme Court of North Carolina in two cases, decided respectively in 1870 and 1877, known as the Hill and Belo cases, and these cases are conclusive in favor of the proposition that the said ordinance of 1868 gave, per se, lawful authority to issue these bonds, and the Supreme Court of the United States so holds (180 U. S., 506, *supra*).

Hill vs. Commissioners of Forsyth County, 67 N. C., 367 (June Term, 1870).

Belo vs. Commissioners of Forsyth County, 76 N. C., 489 (January Term, 1877).

The Original Ordinance authorized the railroad in Wilkes County in aid of which the bonds were voted, independently of the Act of February 20, 1879.

We understand the learned counsel for the appellants to argue that the particular railroad constructed in Wilkes county, in respect of which the bonds in question in the present case were issued, was a new branch line, and was not authorized until the passage of the act of February 20, 1879. In making this argument, however, the learned counsel is clearly mistaken in his facts. The language of Section 1 of said ordinance of March 9, 1868, printed in the record in this case, pages 62–66, is

" a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lex-

ington, in Davidson county, running by way of Salem and Winston, in Forsyth county, *to some point in the northwestern boundary line* of the state, to be hereafter determined, a company is hereby incorporated," etc.

Now, a glance at the map of the State of North Carolina shows that such a railroad to the "northwestern boundary line of the state" **must necessarily pass "near or through" Wilkes county.** The northwestern boundary line of the state is the line which is reached by going in a northwesterly direction "from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford County, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county." This is the **main line** of the railroad as contemplated by the said ordinance of March 9, 1868; and that railroad, in respect of which the bonds were issued in the present case, is a part of such main line of railroad. It is true that the said road has not been constructed, we believe, beyond the town of Wilkesboro, in Wilkes county, and that the point on the northwestern boundary line of the state has not yet been determined, as indeed it has not been necessary to determine it, because the railroad has not yet reached, or approached near to that boundary line, and the said ordinance did not prescribe any limit of time within which the said road should be constructed to the said northwestern boundary line.

When Section 1 of the said ordinance said the "*northwestern* boundary line of the state," it meant precisely what it said. It did not mean the *northern* boundary line of the state, to which the learned counsel for the appellants pointed in his oral argument in the United States Supreme Court. Not only is this obvious

from reading this express language of Section 1 of the ordinance, but it is also further obvious from the language of Section 13 of the said ordinance (Record, p. 66), as follows, to wit:

"Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia."

When, therefore, the Constitutional Convention meant the *northern* boundary line of the State, to wit, the line of the State of Virginia, it said so, and described the line as "the line of the State of Virginia," which is a wholly different thing from the *northwestern* boundary line of the state, mentioned in Section 1 of the said ordinance.

Furthermore, the topography of the country is such that the line of railroad described in Section 1 of the said ordinance, to wit, "a railroad of one or more tracks from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state" must necessarily pass "*near or through*" *Wilkes County*. Such a road would naturally run up the valley of the Yadkin river through Wilkes county. This is the only natural and practicable route, and was the one intended and prescribed by the said ordinance of March 9, 1868. On either side of this Yadkin valley are high hills and mountains, and this Yadkin valley forms the natural and only proper route for a railroad from the points mentioned to the northwestern boundary line of the state. In view of these facts of physical geography, well known to the Constitutional Conven-

tion which enacted the ordinance, this Section 1 is in reality as specific as if the said Convention had prescribed in express terms that this road should go up the Yadkin valley through Wilkes county, mentioning that county by name.

But, in any view, the road must necessarily run "*near or through*" *Wilkes county*, and that is the material thing, and the only material thing.

But in order to hold that the said ordinance of March 9, 1868, authorized the construction of the railroad in Wilkes county, and the issue of the bonds in question in respect thereof, it is not necessary that the said line of railroad in Wilkes county shall be deemed a part of the main line of the said road. Section 13 of the said ordinance above quoted, provides :

"That the company shall have power to construct *branches of said road*, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surrey county, to the line of the State of Virginia."

The road in question is not a branch which runs from Winston and Salem by way of Mount Airy, but that was only one of the branches which the said Section 13 authorized the said company to construct. It was also authorized by said Section 13 to construct other branches. Even if the said railroad in Wilkes county is to be regarded as a branch of said railroad (although, as we have shown above, it is to be regarded not as a branch, but as main line), yet these bonds now in question were properly authorized by the said ordinance to aid in the construction of such branch.

The railroad in question is not a "branch," but a part of the "main line" originally authorized by the Ordinance of the Constitutional Convention passed

March 9, 1868, but even if it were a "branch" the road was authorized and the bonds are valid.

It is argued by the learned counsel for the county, that the act of February 20, 1879, was the first authority for the construction of this railroad in Wilkes county, in aid of which the bonds in question were issued. The learned counsel says that the act of 1879 amends Section 13 of the original charter, by adding the words "and one of which [branches] shall be constructed from the town of Winston and Salem, up the Valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's factory in the county of Caldwell, which branch shall be known as second division." The learned counsel in one breath argues that this act of February 20, 1879, is invalid, because the ayes and noes do not appear on the House journal in the second reading, and in the next breath he argues that this railroad in Wilkes county is a *new* road, and was not authorized by the ordinance of March 9, 1868, because this act of 1879 speaks of this road as a branch. In regard to this argument it is to be remarked that there is no magic in the name "branch," and it is immaterial in the construction of the ordinance of March 9, 1868, whether the act of 1879, passed ten years afterwards, and by a different body of men, speaks of this road as a "branch." The real question is whether this railroad was authorized by the ordinance of March 9, 1868, whether it be called a "branch" or "main line." As to this fact there can be no possible question.

Even if this railroad constructed in Wilkes County is a branch, it was authorized by Section 13 of the original ordinance, although said Section 13 of the

original ordinance did not make it mandatory upon the railroad to construct the same, this *mandatory* provision being first inserted in the act of February 20, 1879, and even if this railroad in Wilkes County were to be called a "branch," it was, nevertheless, authorized by the said ordinance of March 9, 1868, and that ordinance authorized the issue of bonds to aid in the construction thereof.

The power to issue bonds was conferred upon any county "near or through which said railroad may pass." This power was given whether the said railroad was what is called "main line" or "branch."

The language of the act is "near or through which *said railroad* may pass"—that is, whether the said railroad be what may be called main line or branch, the power was expressly given by said Section 13 of the ordinance to construct branches—and even if this railroad into Wilkes county were to be regarded as a branch under the said ordinance of 1868 (clearly it should not be), still there was clear power for Wilkes county under the said ordinance to issue said bonds, for this was, in any view, a "railroad" of said company which passed "near or through" Wilkes county. On no theory can it be urged that what runs into Wilkes county is not "railroad," and railroad of the Northwestern North Carolina Railroad Company, and this railroad passes "near or through" Wilkes county, and, therefore, the said county of Wilkes was expressly authorized by the said ordinance to issue the bonds now in question, and this is so whether the said railroad be called a branch, under Section 13 of the said ordinance, or whether it be regarded as main line.

The learned counsel for the county seeks to argue

that because the act of February 20, 1879 (if the journals had shown that it was properly enacted by the legislature), undertook to authorize the construction of the railroad into Wilkes county and the issue of bonds by the county in aid thereof, therefore the said ordinance of 1868 had not authorized the said railroad nor the issue of bonds. A more complete *non sequitur* it would be hard to find. It frequently happens that out of abundant and extra caution a second act is passed, which undertakes to confer an authority which has already been given by a preceding enactment. The question whether or not such second enactment confers the authority is wholly immaterial as affecting the question whether the first enactment conferred the authority. Especially is this true when the second enactment was passed by a different body of men in the legislature, more than ten years after the original enactment. This second body of men obviously had no right or power or authority to determine in 1879 whether the ordinance of 1868 conferred the authority or not, and, as a practical matter, the act of 1879 was, of course, passed by the legislature without any definite or careful consideration of the question whether or not the authority already existed. A similar second authority was attempted to be conferred in the case of the bonds of Forsyth county, in question in the *Hill* and *Belo* cases, above cited, in respect of which the legislature passed a second act—namely, the act passed the 11th of August, 1868, which second act undertook to ratify and approve the issue of the said Forsyth county bonds. The Supreme Court of North Carolina, however, held that the original ordinance authorized the issue of the said bonds, and so, also, the Supreme Court of the United States in the present case states that the Supreme Court of North

Carolina thus held, and that this ordinance authorized the issue of the said bonds independently of the said second act of August 11, 1868.

The precise question is whether the ordinance of 1868 authorized the construction of a railroad by the Northwestern North Carolina Railroad Company " near or through " Wilkes county.

What may or may not have been authorized by the act of February 20, 1879, is wholly immaterial to this question, for, if the ordinance of 1868 authorized the construction of a railroad " near or through " Wilkes county, then the said ordinance also gave authority to Wilkes county to issue county bonds to aid in the construction of such railroad. The language of Section 1 of the ordinance is:

" A railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county to some point in the northwestern boundary line of the state, to be hereafter determined," etc.

There can be no doubt whatever that a railroad running from the initial point on the North Carolina Railroad, by way of Salem and Winston, " to some point on the northwestern boundary line of the State," is such a railroad ; that is, is a railroad authorized by the said ordinance. This language of said Section 1, above quoted, of said ordinance, leaves to be determined only the " POINT *in the northwestern boundary line of the State.*" The learned counsel for the appellants attempts to argue as if the said ordinance had prescribed that the *route* of the said railroad should be hereafter determined. There is no such language in the said ordinance. The only thing that is to be hereafter determined is the " point in the northwestern

boundary line of the state" to which the said road shall run. That point has never yet been determined. The learned counsel for the county argues as if the said act of February 20, 1879, was an act which had been passed to determine something which was by said ordinance expressly required to be hereafter determined. The act of February 20, 1879, does no such thing. It does not determine the "point in the northwestern boundary line of the state" to which the said road shall run.

The words in the said Section 1, "to be hereafter determined," may mean either that the company is to determine such point or that the legislative body of the state is to determine it. It is immaterial for the purposes of this case by which one the determination is to be made. Suppose it means that the legislature of the state should designate a point in the northwestern boundary line of the state to which the road should run. Then the road already constructed through Wilkes county can be continued to such point as shall be so designated by the legislature. This road would then be a road exactly within the description of the said Section 1 of the said ordinance, for it would be a road from the initial point, "running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state," to a point which had been determined by the legislative body—if the determination must be made by the legislative body. The intervening *route* between Salem and Winston, and the "point in the northwestern boundary line of the state" is not in any view required to be "hereafter" determined by the legislative body. Such *route* is left open to be determined by the company.

The learned counsel for the county, however, undertakes to argue as if the railroad company must wait

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until the "point in the northwestern boundary line of the state" has been determined by the legislature, or until a route has been determined, before the company proceeds to construct a railroad. In support of such argument he urges that some point in northwestern boundary line of the state might be designated by the legislature which would make the route through Wilkes county not the shortest route to such point in the northwestern boundary line of the state. This fact, however, that the route through Wilkes county might not in such an event be the shortest line is clearly immaterial.

But suppose that the argument of the learned counsel for the county be true, and that it is necessary for such road to go by way of the shortest route, still Wilkes county would be a county "*near or through*" which the said railroad *must* run. A glance at a map showing the geography of the country makes this conclusion inevitable. We respectfully ask the court to look at any standard and official map of the state of North Carolina, and of the region mentioned in the said ordinance, and we respectfully call the attention of this Court to the fact that whichever way a railroad may run "by way of Salem and Winston, in Forsyth county," to some "point in the northwestern boundary line of the state," such railroad *must run* "*near or through*" *Wilkes county*. The railroad company was, therefore, beyond any question, expressly authorized by the said ordinance of 1868 to construct the said railroad "near or through" Wilkes county, and the said county was by the said ordinance expressly authorized to issue the bonds now in question.

This attempted defense on the part of the county, however, that the route of this road was one which was not authorized by the said ordinance of 1868, is a

defense utterly unworthy of the people of the county. The purpose of the said ordinance clearly was to authorize the construction of a railroad from the initial point "by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state," and, furthermore, to authorize any county "near or through" which said railroad should run, *upon having a vote of the people of the county*, to issue bonds to aid in the construction of such railroad. The people of Wilkes county voted with practical unanimity to issue these bonds. They did it for the purpose of obtaining the railroad and the railroad facilities. The bonds were voted. The railroad company constructed the railroad. On these facts there is not only no legal merit, but no moral or equitable merit, in the county's attempting to raise any such frivolous defense.

The learned counsel for the county also mentions the fact that the ordinance of March 9, 1868, in Section 12 thereof, refers to the act incorporating the North Carolina and Atlantic Railroad Company, whereas the name of that company should be the Atlantic and North Carolina Railroad. This was obviously a mere clerical error. The company and the act intended were certain, as was held by the Supreme Court of North Carolina in the said *Belo case*, 76 N. C., 489, where the court expressly refers to Section 34 of the said act of 1852, which is printed in the record in this case, and mentions the same as being a part of the act referred to in the said Section 12 of the ordinance of March 9, 1868. This decision was rendered long before the bonds in question in the present case were issued, and is conclusive in the matter as respects the present bonds.

The learned counsel for the county also argues that the framers of the constitution of 1868 clearly intended to safeguard the interests of the counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. We would go even further and say that the framers of the constitution in 1868 clearly intended to safeguard the interests of the counties by requiring that the voters of the county should vote upon any proposition to levy a tax or incur a debt, except for necessary expenses. This was the means by which any undue taxation or undue incurring of debt was to be checked and regulated. The people of the county voted almost unanimously in favor of the issue of the bonds in the present case, and any attempt now by the learned counsel to argue that any great public policy announced in the constitution of 1868 has been disregarded is utterly without foundation.

Galloway case wholly inapplicable.

The learned counsel for the appellants cites the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147 (1869). That case arose under Article V., Section 4, of the constitution of North Carolina, which is as follows:

SECTION 4. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this Constitution*, or in which the State has *a direct pecuniary*

interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

* * * * * *

This section refers wholly to bonds issued by the *State*, and not at all to bonds issued by the counties, and its provisions are different from any provisions, either constitutional or statutory, relating to bonds issued by counties. The Court in that case held (p. 158),

" that the road provided for in the act of 18th December, 1868, is neither an unfinished road nor one in which the *State* had, at the adoption of the constitution [April 24, 1868], a direct pecuniary interest."

No such question arises under the constitutional provisions or legislation applicable to the Wilkes County bonds.

The question in the case of *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, was whether, under Article V., Section 5 (now Section 4), of the constitution, the general assembly of North Carolina had the power to pass the act of December 18, 1868, eight months after the adoption of the constitution (April 24, 1868), authorizing **a new line of railroad,** and providing for the issue of state railroad aid bonds, **without submitting the question to a vote of the people of the State.** PEARSON, C. J., states the question involved and decided in the case as follows:

(p. 151): " Under Article V., Section 5, a question is made ' Has the General Assembly power to create this debt of two millions in aid of the Chatham Railroad Company unless the subject be submitted to a direct vote of the people ? ' "

The Constitution, Article V., Section 4, provided that no such State bonds could be issued

"except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution*, or in which the State has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state and be approved by a majority of those who shall vote thereon."

The precise question, therefore, in this *Galloway case* was whether the road in question, first authorized December 18, 1868, eight months after the constitution was adopted, was an "*unfinished*" road "*at the time of the adoption of the constitution*" within the meaning of the said Section 4, and the Court held, of course, it was not. *No such question arises in the present case.*

The line of railroad into Wilkes County was clearly authorized by the original ordinance of the constitutional convention passed March 9, 1868, Sections 1 and 13, and was not like the line of railroad mentioned in the case of *Galloway vs. Railroad Company*, 63 N. C., 147, a new line of railroad.

The Supreme Court of the State of North Carolina distinctly declared in said *Hill* and *Belo cases* that the said ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company was *per se* and without any legislative act sufficient authority for a county to subscribe to the capital stock of the Railroad Company and issue county bonds in payment therefor. The court distinctly puts its decision upon the ground that the "bonds were valid in the hands of *bona fide* holders without the aid of this healing act;" that is, under the ordinance of 1868, and without the aid of the act of August 11th, 1868. This is not any mere dictum of the court, but is the ground on which the court expressly rested its decision. Mr. Juctice HARLAN in

this very case (150 U.S., p. 529) has expressly so stated. It is true that the court also rested its decision upon the further ground that, "if any defects existed in the bonds," "the ratifying act of August 11, 1868, was a curative act and validated both the county subscription and the issue of the bonds." The court put its decision on both grounds, and not on either ground to the exclusion of the other. The language of the court as respects both of these grounds, therefore, amounts to a decision, and its language on either ground is not a mere dictum.

Furthermore, this decision in the Hill case made in 1870, and this decision in the Belo case made in 1877, construing this ordinance of the Constitutional Convention of 1868, was a construction upon which the purchasers of the bonds in question in the present case had a right to rely.

When the bonds in the present case were issued in 1889 these two decisions above quoted stood unreversed and unquestioned in the officially printed reports of the Supreme Court of North Carolina, construing the said ordinance. At the time of the issue of these bonds there was not a word or syllable in the said reports contrary to the said decisions. The said ordinance of the Constitutional Convention has not been in any wise changed either by constitution or by statute, from what it was when the above-quoted opinions of the Supreme Court of North Carolina, in the two Forsyth county cases, were rendered.

The provisions of the constitution of the State of North Carolina, mentioned in the said first question, certified by the Circuit Court of Appeals—namely, Article II., sections 14 and 16, and Article V., sections 1, 4, 6 and 7, and Article VII., section 7—were precisely

the same at the date of the rendering of the decisions in the two *Forsyth county cases* above cited as they were when the bonds in question in the present case were issued.

As stated above, the said ordinance of the Constitutional Convention of 1868 had not been repealed, nor had the legislature attempted to repeal it. Certain additional acts had been passed; but if on this branch of the argument it be conceded, merely for the sake of the argument, that all of those acts had fallen, because not properly enacted, nevertheless the said ordinance of the Constitutional Convention of 1868 stood when these bonds were issued, and stands to-day, precisely the same as it stood when the bonds were issued which were in question in the two Forsyth County cases above quoted.

This present case, therefore, is brought directly within the principles announced by the Supreme Court of the United States in numerous cases in which this Court has held that when a contract, and especially one which is evidenced by commercial paper, was valid under the constitution and statutes of a state, as then construed by the State Court, it will be held valid by the Supreme Court notwithstanding the fact that after such contract was made the state Court may, as in the case now at bar, have changed its decisions.

This proposition was certified to this Court in Answer No. 2 by the Supreme Court of the United States (p. 533).

Recital of the Act of February 20, 1879, in the bonds is immaterial.

It is immaterial that the bonds in question in the present case (Record, p. 19) re-

cited that they were issued by authority of the act of February 20th, 1879, which was an amendment of the Convention ordinance of 1868, and did not recite that they were issued under the ordinance itself, for it is well-settled law that if there was, in fact, legislative or legal authority for the issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

A decision of this Court exactly in point is *Anderson County Commissioner vs. Beal*, 113 U. S., 227 (1885). In that case Mr. Justice BLATCHFORD, giving the opinion of this Court, says (p. 236):

"It is not disputed that the recital in the bond that it was issued under the act of February 25th, 1866, Sess. Laws of Kansas, 1866, ch. 24, page 72, was an error * * * (p. 237). It is very clear that there was legislative authority under the act of 1869 for the issuing of the bonds in question. There was an election, and the requisite majority of those who voted assented to the proposition for the subscription to the stock and the issue of the bonds, and the subscription was made by the proper officers, and they issued the bonds," etc. * * * (p. 238). "The bond recites the wrong act, but if that part of the recital be rejected there remains the statement that the bond 'is executed and issued' 'in pursuance to the vote of the electors of Anderson County of September 13th, 1869.' The act of 1869 provides that when the assent of a majority of those voting at the election is given to the subscription to the stock, the county commissioners shall make the subscription, and shall pay for it, and for the stock thereby agreed to be taken, by issuing to the company the bonds of the county."

This Court, therefore, held the bonds valid, notwithstanding they recited the wrong act.

In Dillon on "Municipal Corporations," Fourth Edition, section 523, note, it is stated:

"That bonds recite as authority for the issue a wrong act of the legislature does not necessarily invalidate them, if it can be shown that they were in fact issued under an act conferring the power" (citing *Anderson County Commissioners vs. Beal, supra*, and other cases).

See, also, to the same effect: *Knox County vs. Ninth National Bank*, 147 U. S., 91; and *Cairo vs. Zane*, 149 U. S., 122.

Furthermore, even if the rule were not as laid down in *Anderson vs. Beal, supra*, these bonds recite that they are issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, 1879, entitled "An Act to amend the charter of the Northwestern North Carolina Railroad," etc. The holder of these bonds is therefore notified of this act, but **on examining this act he will further see that this act is an amendment "of the ordinance of the convention of one thousand eight hundred and sixty-eight, ratified the ninth day of March, one thousand eight hundred and sixty-eight."** As said ordinance gave authority for the issue of these bonds, and as the holder of the bonds is thus, by reference to the act of February 20, 1879, referred to the said ordinance of March 9, 1868, which the said act of February 20, 1879, amends, there is no reason why a bondholder may not examine and refer to the said ordinance as authority for the issuance of the bonds in question.

In the case of *Anderson vs. Beal, supra*, the Supreme Court of the United States held that even if the bond recited a wrong act, it was competent to rely upon another act which really did give authority, although such other act was not recited. Much more is it competent in the present case, to refer to this ordinance

of March 9, 1868, as the bondholder did, by reference as above stated, have notice of the said ordinance by the recital in the bond and by an examination of the act of February 20, 1879, there recited.

The learned judge who gave the majority opinion in the case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, 1898, cited the case of *Gilson vs. Dayton*, 123 U. S., 59, as holding that the recital of a wrong act is fatal to the validity of bonds. This case does not hold any such thing. On the contrary, the whole case is stated in the opinion United States Supreme Court, given by Mr. Chief Justice WAITE, the opinion being in full as follows—to wit (p. 61):

"The judgment in this case is affirmed on the authority of *Crowe vs. Oxford*, 119 U. S., 215. See also *Post vs. Supervisors*, 105 U. S., 667, 691. It appears on the face of the bonds sued for that the subscription was made under and by virtue of the act of February 18, 1857, and that the vote of the town was taken at a special town meeting called upon the 'application in writing of fifty legal voters of said town,' which is in accordance with the provisions of that act. The act of March 6, 1867, which the plaintiff now claims is sufficient to support the bonds, requires that the application for the town meeting shall be made by 'twenty voters and *tax-payers*.' The record does not show that any of those who signed the application for the meeting at which the vote was taken were taxpayers. It thus appears from the bonds themselves not only that they were issued under the act of 1857, but that they were not issued under that of 1867."

It thus appears that in the case of *Gilson vs. Dayton* the act which might, in fact, have given authority was not followed, as there was not any application of *taxpayers;* and, of course the bonds in that case were held invalid.

The late decision, 1898, by the State Supreme Court (123 N. C., 308) **overruling the Hill and Belo cases is intrinsically unsound and proceeds upon mistaken data.**

The Supreme Court of North Carolina, in the case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, decided in 1898, by a bare majority, long after these bonds were issued, has undertaken to hold for the first time that the said ordinance of March 9, 1868, adopted by the constitutional convention of 1868 did not confer any power upon Wilkes county to subscribe for the stock of the railroad company and issue these bonds. In attempting to do this the court has undertaken to overrule the decisions in the *Hill case* and the *Belo case*, concerning the Forsyth county bonds, decided in 1870 and 1877, respectively, and above quoted. The court, in the *Call case*, by a bare majority, said that these two cases were distinguishable, but it gave no real reason for any distinction. In some respects the statements of the court in *Commissioners vs. Call* are obviously incorrect; for example, the court says (p. 318):

"Another important point of difference is that the Forsyth county bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any, had expired by its own limitation."

It is impossible to conceive what the court meant by the ordinance of 1868 expiring "by its own limitation." There is no limitation in the ordinance which makes it expire. The *Hill and Belo cases*, above quoted, do, as we have already seen, expressly decide that the ordinance gave power to issue the bonds these in question.

Again, the Supreme Court of North Carolina, in the *Call case*, says :

(p. 321) " The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II., Section 14, is as follows : ' No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal.' Article VII., Section 7, is as follows : ' No county, city, town or municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.' "

This proposition of the court, and the sections of the constitution cited by it, do not at all affect the question of the continued existence of the said ordinance of the constitutional convention incorporating the Northwestern North Carolina Railroad Company, ratified March 9th, 1868. Article II., Section 14, of the constitution, quoted by the court, is as follows : " No law shall be passed," etc. This, by its very terms, and under all the authorities, is a direction to the legislature. " No law *shall* be passed," etc., obviously means shall hereafter be passed. This Section 14 occurs in Article II., which is devoted to directions to the legislative body, and it prescribes a rule of procedure for the future enactment of laws *by the legislature*. It does not either expressly or impliedly repeal or annul any

existing laws of the state. "It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

This question was before the Court in *County of Scotland vs. Thomas*, 94 U. S., 682. The decision of the Court on that point is stated as follows (p. 688):

"The clause of the Constitution on which the defendent relies is the fourteenth section of art. II., and is as follows: 'The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto.' This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations. It does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come."

See, also, to the same effect:

County of Callaway vs. Foster, 93 U. S., 567.
County of Henry vs. Nicolay, 95 U. S., 619.
Louisiana vs. Taylor, 105 U. S., 454.
Macon County vs. Shores, 97 U. S., 272.
Howard County vs. Paddock, 110 U. S., 384.

See, also, other cases cited in "Dillon on Municipal Corporations," Fourth Edition, Section 542, Note.

The principle of these decisions is recognized by the Supreme Court of the United States in *Norton vs. Brownsville*, 129 U. S., 479, where that Court, Mr. Chief-Justice FULLER giving the opinion, after citing certain other cases which arose under provisions of a constitution which directly prohibited counties, cities, etc., from issuing railroad aid bonds, says (p. 490):

"These cases sufficiently illustrate the distinction between the operation of a *constitutional limitation*

upon the power of the legislature, and of a constitutional inhibition upon the municipality itself. *In the former case past legislative action is not necessarily affected*, while in the latter it is annulled."

Article VII., Section 7, of the constitution of North Carolina, is a "constitutional inhibition upon the municipality itself," but it only inhibits the issue of railroad aid bonds by a municipality "unless by a vote of a majority of the qualified voters therein." There was a vote of a majority of the qualified voters in the case of these Wilkes county bonds, and, therefore, this "constitutional inhibition upon the municipality itself" was not violated.

Ordinance of March 9, 1868, not repealed by the Constitution or any legislative act and was as to the power to issue bonds in full force in 1889 when the bonds in suit were issued.

Article II., Section 14, of the Constitution, does not either expressly or impliedly require the re-enactment of existing legislation, even statutory legislation, much less ordinance legislation enacted by the Convention that framed the Constitution. Not only so, but another part of the constitution, Article IV., Section 19, expresely provides:

"The laws of North Carolina, not repugnant to this constitution, or the constitution and laws of the United States, shall be in force until lawfully altered."

Also Article VII., Section 12, provides:

"All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution."

There are no other repealing provisions in the Constitution of 1868. No attempt is made in the Constitution of 1868 to repeal the said ordinance of March 9, 1868.

[That a "county" is a "municipal corporation" within this Section 12 appears from the language of Section 7 of the same Article VII., which speaks of "county, city, town or other municipal corporation."]

This Article II., Section 14, does not provide any method of passage of laws *theretofore* enacted, and has no application to any laws previously passed.

Article VII., Section 7, however, does operate directly upon the county or other municipal corporation, and it does provide that such a county "shall not contract any debt," etc., "except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." This section, however, does not expressly or impliedly repeal even any previously-existing statute. Much less does it repeal this ordinance of the Constitutional Convention. What this section does do is to operate directly upon the municipality and to provide that the municipality "shall not contract any debt," etc., "unless by a vote of a majority of the qualified voters therein." Such a vote was had in the present case, and this section of the constitution therefore, did not prohibit the issue of these bonds of Wilkes County.

Applying this language of Article VII., Section 7 of the constitution to the said ordinance of the constitutional convention, it is obvious that even if this ordinance were in the nature of a statute only, the ordinance would not be repealed, because the said ordinance, by referring to the act of 1852, Secs. 33–37, above quoted, expressly provides for the holding of an election by the qualified voters of the county to

vote upon the question of the issue of the bonds. The said ordinance, therefore, is not inconsistent with the said Article VII., Section 7, of the constitution, and was not repealed by it. We have already seen that the said ordinance was not repealed by Article II., Section 14, of the constitution.

Furthermore, the said Article II., Section 14, has no application to the said ordinance. The said ordinance is not a statute, and is, therefore, not within Article II., Section 14. This Section 14, is addressed to the legislature, and the words "no law shall be passed," etc., in the said Section 14 mean no law enacted by the legislature. The said ordinance was enacted by the constitutional convention, and the language of Article II., Section 14, is wholly inapplicable. For example, there were not two houses in the constitutional convention, and, therefore, the ordinance could not have been agreed to by *each house respectively*, etc., etc.

The Supreme Court of North Carolina, then, committed an obvious and plain error in holding, or attempting to hold, that either Article II., Section 14, or Article VII., Section 7, repealed, or undertook to repeal, the said ordinance adopted by the constitutional convention.

Moreover the said ordinance and Sections 33 to 37 of the Act of 1852, made part of it, fully comply with Sections 6 and 7 of Article V. of the Constitution, as fully appears from the "special" character of said Ordinance—even if said sections 6 and 7 can apply to said Ordinance.

The true nature and effect of the said ordinance incorporating the Northwestern North Carolina Railroad Company appears not to have been considered by the Supreme Court of North Carolina in the said *Call case*.

This is, perhaps, not surprising, as there was no brief and no counsel before the court in that case to present anything in opposition to the claim of the county commissioners that these bonds were invalid.

There in neither an EXPRESS nor IMPLIED REPEAL of the Ordinance of March 9, 1868, and the issue of the bonds in suit did not violate any provision of the Ordinance or of the Constitution.

There being no *express* repeal by the constitution of the ordinance of March 9, 1868 (which ordinance includes Sections 33, 34, 35, 36 and 37 of the charter of the North Carolina and Atlantic Railroad Company, being chapter 136 of the laws of North Carolina, 1852), at the very utmost the constitution would affect the said ordinance only so far as it was plainly inconsistent with it; that is to say, it would be a *repeal*, if at all, *by implication*. On the contrary, there being no conflict between the ordinance and the constitution, relating to the power to issue these bonds, the constitution itself, in express terms, recognizes and continues the ordinance in force, even if it be treated as an ordinary enactment, since Section 19, Article IV., of the constitution provides as follows:

"SECTION 19. The laws of North Carolina, not repugnant to this constitution or the constitution and laws of the United States, shall be in force until lawfully altered."

Now, if you lay the constitution adopted April 24, 1868, alongside the ordinance of March 9, 1868, no repeal or annulment of the power of counties, mentioned in the ordinance of March 9, 1868, to take stock or issue bonds will be found. On the contrary, the

scheme of the constitution and the scheme of the ordinance are the same. The ordinance authorizes counties on or near the line of the chartered railroad to subscribe for stock on a vote of a majority of the qualified voters of the county. The constitution, Article VII., Section 7, authorizes counties to become subscribers to the stock of railroad companies on "a vote of the majority of the qualified voters therein;" that is to say, both under the ordinance and constitution counties may be authorized to subscribe stock when sanctioned by a majority of the qualified voters of the county, and such a majority did sanction the issue of the bonds of Wilkes county in the present case.

It is alleged in the complaint (paragraph 22) as follows:

"That the county of Wilkes, acting through its board of commissioners, and in accordance with the ordinance and acts, as above set out, subscribed the sum of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company, the proporsition to subscribe the said amount having *been submitted to the qualified voters of the county at an election held according to law, and a large majority of the said qualified voters having voted in favor of the same.*"

This is admitted in the answer (paragraph 22) as follows:

"These respondents, still denying the authority of the former commissioners to issue bonds or subcribe to the capital stock of the said company, admit that they did subscribe and issue bonds in the amounts alleged in the complaint, and that *it was ascertained and declared that a majority of the qualified voters of Wilkes county had voted in favor of making such subscription, and that it is now too late to question said finding as to said vote.*"

Moreover, the bond recites that the said issue of bonds now in question was

"authorized by *a vote of a majority of the qualified voters of Wilkes county*, by an election regularly held for that purpose on the 6th day of November, A. D. 1888, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889."

That this recital creates an estoppel as to the vote, even though the ordinance is not recited in the bond, see *Anderson County vs. Beal*, 113 U. S., 227, quoted, *supra*, on this brief.

So that in the present issue of bonds by Wilkes county there is no provision either of the ordinance of March 9, 1868, or of the constitution of the state, which was adopted April 24, 1868, repealing, annulling, or in any way impairing or affecting the power of Wilkes county to issue the bonds in question.

As elsewhere pointed out in this brief, Section 14 of Article II. has no application, because that refers in the language "No law shall be passed," etc., to laws which shall be hereafter passed, and, also, refers only to laws to be passed by the General Assembly, since it prescribes the method and manner of their passage by readings on three different days, and taking the ayes and the noes on the second and third readings in *each house*, and entering the same on the journal, &c., &c. These requirements in their terms and nature can have no reference or application to the ordinance of 1868, passed by the Constitutional Convention, which was *only one house*.

Ordinance of Constitutional Convention passed March 9, 1868, not inconsistent with Constitution. Section 7, Art. VII. of Constitution may be read as amending said Ordinance and Act of 1852, if necessary.

The said ordinance of March 9, 1868, was of the same dignity as the constitution, and was operative *per se* by its own force, and it could be maintained, if necessary, that no provision of the constitution of 1868 would operate to modify or repeal the said ordinance if there was any conflict between the two. But it is not necessary in the present case to maintain that proposition, for the constitution is not in any wise inconsistent with the said ordinance. Article VII., Section 7, of the constitution, which provides, in substance, that a county shall not contract any debt, etc., except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein, might apply to, and operate directly upon, any county in the state, and thus, if necessary, be written in as an amendment to the said ordinance of March 9, 1868. That in such a case such a provision of the constitution operates to amend an existing charter passed by an act of the legislature is expressly held in the case of *East St. Louis vs. Amy*, 120 U. S., 600, and also in the case of *East St. Louis vs. People*, 124 Ill., 655.

In the case of *East St. Louis vs. Amy, supra*, the facts were as follows: In 1869 the legislature of Illinois had passed an act granting the city of East St. Louis power to issue $100,000 of bonds and to levy a tax of three mills for the payment thereof. In 1870 the new constitution of Illinois went into effect, which, in substance required that a municipal corporation issuing any bonds should, at or before the time of doing so, provide for the levy and collection of a

sufficient tax to pay the interest on such bonds, and to pay the principal within twenty years. This Court held that this provision of the constitution of Illinois of 1870 *did not repeal the said authority granted by the said act of 1869*, but that it amended it, and that *this amendment was, in effect, written into the charter*, so that the $100,000 of bonds were still authorized to be issued; but that, instead of the three mill tax levy provided in the charter for the payment thereof, a tax levy sufficient for the full payment of the interest and principal could be levied, as required by the constitution.

The Supreme Court of Illinois, in the case of *East St. Louis vs. People, supra*, decided the same question the same way, and cited with approval the opinion of the Court in *East St. Louis vs. Amy, supra*. See, also, to the same effect the case of *Neal vs. Delaware*, 103 U. S., 370, cited by this Court in *East St. Louis vs. Amy*, 120 U. S., 600, 603, *supra*, in which case it was held that the Fifteenth Amendment to the Constitution of the United States of itself, and without any action by the State, was written into the election law and into the jury law of the State of Deleware as an amendment thereof, and that *no new legislation* for this purpose was required by the State of Delaware, but that these election laws and the jury laws stood, and were in force, as thus amended by the Fifteenth Amendment to the Constitution of the United States.

The vote required by the Constitution of North Carolina, Art. VII., Sec. 7, was had for the bonds now in question.

A vote of the people of the County was required also by the said Ordinance of March 9, 1868, and sections

33-37 of said Act of 1852, referred to in section 12 said Ordinance. The vote which was had satisfied both said Art. VII., Sec. 7, of the Constitution, and the said Ordinance and said Act of 1852.

The learned counsel for the County repeats the error of Justice FURCHES, that in the *Hill* and *Belo cases* the subscription was made and the bonds were issued *before* the adoption of the constitution of 1868. It is difficult to understand why the learned counsel persists in repeating this obvious error and basing any argument thereon. The facts are stated and the dates specifically given by the Supreme Court of North Carolina in the *Hill case*, 67 N. C., 367, and again in the *Belo* case, 76 N. C., 489. It clearly and unquestionably appears there that the subscription was not made until the *June term, 1868*, after the constitution adopted April 24, 1868, went into effect; and the bonds were not issued until after August 11, 1868, for they recite an act of that date.

The learned counsel for the county apparently takes the curious position that in the *Hill case* and *Belo case* the Supreme Court of North Carolina made a "*grave mistake as to the very essence and nature of the authority relied on*," and that it is the duty of this Court now to correct the mistake made by the Supreme Court of North Carolina in these cases. The fact is, the Supreme Court of North Carolina, in the *Hill* and *Belo cases*, made no mistake, but correctly construed the said ordinance of March 9, 1868, as giving, *per se*, authority to issue bonds precisely like the bonds now in question; but even if the Supreme Court had made a mistake in the *Belo case*, that case would, under familiar principles, be conclusive in favor of the holders of the present bonds, since that case was decided long

before the present bonds were issued, and at the time of their issuance there was not any decision against their validity, nor any decision in any way modifying or overruling the said *Hill* and *Belo cases.*

The Supreme Court of North Carolina, in the Recent Case of Commissioners of Wilkes County vs. Call, is Clearly in Error in its Consideration and Statements of the Hill and Belo Cases.

The Supreme Court of North Carolina, in *Commissioners vs. Call*, 123 N. C., 308 (p. 317), 1898, undertakes to distinguish the case of *Belo vs. Commissioners*, 76 N. C., 289, by saying as follows:

"We have not overlooked the fact that in *Belo vs. Commissioners*, 76 N. C., 489, this court strongly intimates that Section 12 of the charter did confer the authority given in Section 33 of the act of 1852" [Section 2 of the ordinance of the constitutional convention gave the power, and Section 12 prescribed the manner of its exercise], "but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence, on page 497, that 'as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in *pais* upon the county of Forsyth."

It cannot be possible that it is necessary to remind this Court that there cannot be any estoppel by re-

citals where there was absolutely no legislative authority for the issue of bonds. The whole discussion of the Supreme Court of North Carolina in *Belo vs. Commissioners*, which, as stated by the court in the case of *Commissioners vs. Call*, occupied four pages, proceeded upon the only possible ground—namely, *that there was legislative authority* in the said Ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the court, on page 497, says "does not arise" is not what the Supreme Court of North Carolina, in the *Call case*, apparently means to give the impression that it is, but it is this question, stated in the very words of the opinion of the court in *Belo vs. Commissioners*, to wit :

"When the subscription was voted there is authority and reason for asserting that the Justices could have been compelled by process of law to make the subscription, unless in defense they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company (*People v. Supervisors*, 27, Cal., 655). As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the Court said, distinctly, in *Belo vs. Commissioners :*

"The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the Court said :

"It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act" [that is, the act of August 11, 1868], the only other authority being the said ordinance.

In connection with this case of *Commissioners of Wilkes Co. vs. Call*, 123 N. C., 308, 1898, we desire to call the attention of this Court to what is obviously an error in the statement of facts in the dissenting opinion of Justice FURCHES. He says:

(p. 328) "On the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation [Northwestern North Carolina Railroad Company], which subscription was held to be valid in *Hill vs. Commissioners*, 67 N. C., 367."

The date, March 25, 1868, is obviously an error. This error has been quoted and repeated from time to time by the learned counsel in the present case. It appears from the statements of fact made by the Supreme Court of North Carolina, in the Case of *Hill vs. Commissioners*, not that the bonds of Forsyth County were issued on March 25, 1868, but that on March 25, 1868, the justices made an order to submit the question of subscription to the qualified voters of the county, the vote to be taken on April 4, 1868. It also appears that the returns of the election were made to the June Term, 1868, of the County Court and that the said Court, at the June Term, ordered the subscription to be made. It further appears from the official report of the case of *Belo vs. Commissioners of Forsyth County*, that, of the said bonds, some, at least, were not sold until March 5, 1869, and that these bonds recited that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsyth County, at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th day of August, 1868," so that the said bonds could not possibly have been issued before the 11th of August, 1858.

On this state of facts, the theory advanced by the Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898—namely, that these two Forsyth County cases of *Hill vs. Commissioners*, and *Belo vs. Commissioners*, could have decided that the ordinance of 1868 gave power to issue the Forsyth County bonds, and yet, that, consistently with these two cases, the North Carolina Court, in this later Wilkes County case, could decide that the constitution of 1868, which was ratified by the people April 24, 1868, had wholly repealed the said ordinance of 1868, and that this later decision did not, in effect, overrule the two Forsyth County cases—upon this state of facts, we say, that theory is absurd, and is completely refuted by the chronology. If the constitution which went into effect *April 24, 1868*, completely repealed the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company as to the power of counties to issue bonds, then the Court ought not to have decided in 1870 and 1877, in the two Forsyth County cases, that the said ordinance gave power to issue the Forsyth County bonds there in question, for those bonds were issued long after April 24, 1868, and bear on their face evidence that *they were issued after August 11, 1868*, for they recite the act of that date, as above stated.

Power of Counties given by the ordinance of March 9, 1868, had not expired by limitation in 1889, when the bonds in suit were issued.

The Supreme Court of North Carolina, in the case of *Commissioners vs. Call*, 123 N. C., 308, 1898, refer to the fact that the charter of the North Carolina and

Atlantic Railroad Company, or the Atlantic and North Carolina Railroad, Chapter 136 of the laws of 1852, provides, in Section 45, that "If the said road be not completed within six years after the ratification of this act, this charter shall be forfeited," and the court says: "Therefore, even if the powers granted in the act of 1852 had been given to the Northwestern North Carolina Railroad Company, or the counties in its interest, subject to the 'same restrictions,' those powers would have expired by their own limitation long before their attempted exercise twenty-three years thereafter." This language of the Supreme Court of North Carolina has no support in the ordinance of 1868 chartering the Northwestern North Carolina Railroad Company, nor in the parts of the act of 1852 referred to in the said ordinance. Section 12 of the said ordinance provides "that all counties or towns *subscribing stock* to said company *shall do so in the same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company." This reference to the act of 1852 incorporating the North Carolina and Atlantic Railroad Company is made only so far as the said act of 1852 relates to the manner, rules, regulations and restrictions in *subscribing for stock*. It does not, by reference, make the act of 1852 a part of the said ordinance, with respect to the corporate life and existence of the company, and the six years' provision in Section 45 of the act of 1852 has no application to the Northwestern North Carolina Railroad Company.

Furthermore, this question of the corporate existence of the company is a matter which is expressly covered by other provisions of the said ordinance of 1868. Section 1 of the charter expressly provides

that the said company "shall have a corporate existence as a body politic *for the space of ninety-nine years*," and nowhere in the said ordinance is there any provision for any earlier termination of its charter, or for any forfeiture for not constructing this road.

Moreover, the said ordinance expressly provides for and contemplates the construction of the Northwestern North Carolina Railroad *by divisions*, and not necessarily all at one time, and there is no forfeiture prescribed for failure to construct any one division, nor is there any forfeiture prescribed if the railroad company, after having constructed one division of the road, waits for a time before constructing another division.

Thus Section 5 of said ordinance provides that the said company shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad when completed shall constitute its first division. Here, then, is a provision that the said railroad shall be constructed "as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem," and that this portion of the railroad when completed shall constitute its "*first division.*" No express provision is made in the act as to when any other division of the road is to be completed. Even this division to Winston and Salem is to be completed only "*as speedily as practicable*," and no forfeiture is provided even if this provision is not complied with.

It appears from the two Forsyth county cases *(Hill* and *Belo Cases)* that immediately upon its incorporation, in 1868, the railroad company began to obtain funds with which to construct its railroad to the towns of Winston and Salem, in Forsyth county. This

division of the railroad was constructed. Suppose that it had happened afterwards that no further railroad had been constructed. Said ordinance is wholly silent as to any forfeiture of the charter for not constructing additional railroad. If the ordinance had intended to provide for any such forfeiture, doubtless it would have provided what was to be done with the railroad already constructed, whether that railroad was to be operated by the Northwestern North Carolina Railroad Company, or whether it was to pass into the ownership of some other company.

The true view and the only view to be taken of this said ordinance on the point now under consideration, is that the Northwestern North Carolina Railroad Company might construct its road by sections or divisions from time to time, and that there was no forfeiture prescribed for any failure to complete the road to the terminus designated by Section 1, on the northwestern boundary line of the state of North Carolina.

In addition to the foregoing views, it is to be observed that if the Northwestern North Carolina Railroad Company was liable to have its charter forfeited for not exercising its franchise and constructing its railroad to its whole extent, *this was a matter solely between the state and the railroad company*, and to be taken advantage of only be *quo warranto* proceedings. There is no suggestion in the record that any such proceedings have been had or attempted. So long as the state permitted the road to exercise the franchises and powers conferred by the said ordinance, and failed to exercise any right of forfeiture, if any existed, it is not open to any county which, under the powers given by the said ordinance, had subscribed stock and issued bonds in aid of the construction of the said railroad, to say that the said charter was liable to be forfeited,

and, therefore, the county bonds were invalid. This is a matter with which the county has no concern. Especially has the county no concern in this matter, where the admitted fact is, as in the present case, that the railroad actually was constructed in the county of Wilkes and the county obtained all the consideration which was contemplated for the issue of these bonds.

The authority to issue bonds is not only a power conferred upon the County or municipality, but a privilege of the Railroad Company.

On pages 12 and 15 of the record are sections 12 and 13 of the charter, which give *this corporation* " power to construct branches of " the road, and conferred the authority and power given in Sections 33 and 34 of the Act of 1852, which are as follows :

" Chapter 136 of the Laws of North Carolina, Session 1852.

" SEC. 33. Be it further enacted, That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

" SEC. 34. Be it further enacted, That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend

at the court-house, to which he may make his returns of said poll."

In the case of the County of *Scotland vs. Thomas*, 94 U. S. Reports, on page 689, Justice BRADLEY says:

"The specific question in the present case, therefore, is, whether the authority given the counties and towns in 1847, to subscribe to the capital stock of the Alexandria and Bloomfield R. R. Co., has become extinguished by the subsequent consolidation of that company with other companies, irrespective of the Constitutional provisions referred to."

Justice BRADLEY says, also, on page 688, after quoting the words of the Constitution of Missouri, similar to the words of the North Carolina Constitution of 1868, that "This prohibition, it will be observed, is against the Legislature's authorizing municipal subscriptions or aid to private corporations; *it does not purport to take away any authority already granted.*"

On page 693 Justice BRADLEY goes on to say: "But the case has other aspects, which it is necessary to take into consideration.

* * * * * *

"The project of the railroad promised a great public improvement, conducive to the interest of Alexandria and the counties through which it would pass." "The power was sought at the hands of the Legislature, and was given." "It was relied on by those who subscribed their private funds to the enterprise."

Speaking of this power, he says: "Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or *otherwise*, it is difficult to see. * * * Subscription to the stock *was not only a power of the county, but a privilege of the company.*"

This is the view taken of this question by BYNUM, Justice, in *Belo vs. Commissioners*, and FURCHES, Justice, in his dissenting opinion in *Commissioners vs. Call.*

These powers are not only conferred upon the Counties, but are privileges of the company, the North

Western North Carolina Railroad Corporation. It follows, therefore, that Wilkes County was in "the same category" with Forsyth County.

The route of the road was determined by both the Legislature and the corporation. This was one of the privileges conferred upon the company, as said by Justice BRADLEY, in the case cited above, the *Thomas case*. And, besides, it is not for the County of Wilkes, which participated in the determination of the route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, that there was no power to do it.

We do not understand that the Act of 1879, referred to by Justice HARLAN, to have been adjudged, for all purposes, null and void by the Supreme Court of North Carolina. Section 4 of the Act was adjudged void, but not Section 1. In the case of *Bank vs. Commissioners*, 11 N. C. Reports, 214, the Act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals, but, void as a taxing act, because, for that purpose, under the Constitution, it can be impeached by the same journals.

It is well settled, *in all courts*, that an act can be unconstitutional in part, and constitutional in other respects. So, Section 1 of the Act of 1879 is valid, because, passed, in all respects, and certified, as required by the Constitution. See Act of 1879, and especially Section 5, &c., &c., where, upon its face, it is shown to *have been read three times and ratified*. The case of *Bank vs. Commissioners*, 119 N. C. Reports, 214, is decisive of this, being directly in point, and, indeed, is the case out of which all this litigation has sprung. And, further, if the route was not a proper one, it was acquiesced in by the County when

the Company could have been forced by mandamus to have selected the proper one; or it could have been enjoined, anyhow, from constructing the road on the route determined upon.

II.

There was lawful authority for the issue of these bonds in the present case UNDER THE CODE, **sections 1996 to 2000. These sections of the Code were originally adopted as the act of April 10, 1869. They were afterwards adopted as sections 1996 to 2000 of the Code of North Carolina of 1883. It is admitted by all that these sections of the Code, 1996 to 2000, were adopted in accordance with the constitution as respects the three several readings and the entry of yeas and nays upon the journal, etc.**

The Supreme Court of the United States was careful in answering the first question to say that the Federal court should follow the decisions of the state Supreme Court as controlling upon the inquiry whether legislative enactments of 1868, 1879 and 1881 were passed in such manner as to become, under the constitution, laws of the state, and thus the Supreme Court limited the effect of these decisions of the state Supreme Court to the point whether they had become laws of the state under Article II., Section 14, of the constitution. The Supreme Court of the United States, by thus carefully limiting its answer to the first question, has, in

effect, stated that these decisions of the Supreme Court of the State of North Carolina, with regard to the sections of the Code, are not to be controlling in the Federal courts, and hence the general rule applies, that the Federal courts should either follow the decisions which were in existence when the bonds were issued, if there were any, or, if not, then they should consider the questions for themselves, and they are not controlled by any subsequent decisions of the state Supreme Court. Hence, decisions of the Supreme Court of North Carolina, construing the Code made *after* the bonds in question were issued, do not bind the Federal courts, if such subsequent decisions of the Supreme Court of North Carolina are not in accordance with the general principles of jurisprudence, but the Federal courts may and should, exercise their own independent judgment. There is a long line of decisions to that effect in the Supreme Court of the United States, and these decisions relating to the construction of statutes are expressly recognized and distinguished by the Supreme Court of the United States in its opinion.

It will be noticed that on page 519 the Supreme Court says, referring to the acts of 1868, 1879 and 1881, as follows :

> " Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

Under this decision of the Supreme Court of the United States, the Circuit Court of Appeals will, of course, no longer feel bound by the decisions of the Supreme Court of North Carolina construing the Code *after* the bonds were issued.

OUR FIRST PROPOSITION *under these sections of the Code is that they are prospective in their operation, and that they are not limited to any railroad which had been begun either before the constitution of 1868 was adopted or before the adoption of these sections of the Code by the act of April 10, 1869.*

The language of section 1996 of the Code is: "The Board of Commissioners," etc., "*shall have* power to subscribe stock," etc., "to aid in the completion of any railroad in which the citizens of the county *may have* an interest." *All this is future.* It applies to any railroad in which the citizens of the county may have an interest, either when the act was adopted *or at any time afterwards.* There is nothing in this language which restricts the operation of the act either to the time of the adoption of the constitution of 1868 or to April 10, 1869, the time of the first enactment of the statute which became these provisions of the Code. Any of the recent decisions of the Supreme Court of North Carolina to the contrary are wholly indefensible, and have no support in the language of these sections of the code. Inasmuch as all of these decisions were rendered after these bonds were issued, they are not binding upon the federal courts (See *Folsom vs. Ninety-Six*, 159 U. S., 61, *supra*).

These sections of the Code required an election and a vote of the majority of the qualified voters of the county in favor of the proposition of subscribing the stock and issuing the bonds. This provision was complied with in the case of this present issue of bonds. The bond recites it. The complaint (paragraph 22) alleges compliance, and the answer of the country commissioners (paragraph 24) also admits compliance with this provision of the code.

The recital in the bond is that the bond is "authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose, on the 6th day of November, A. D. 1888." We are aware of the fact that the said bonds recite that they are issued by authority of the act of February 20, 1879. But the recital of the act (if that act of February 20, 1879, be held not to give authority) would not invalidate the bonds, if they were, in fact, authorized by some other act, as sections 1996 to 2000 of the Code, now under consideration. See *Anderson County vs. Beal*, 113 U. S., 227, where the wrong act was recited. In that case, notwithstanding the bonds recite the wrong act, the Court held, as respects the recital of the election, as follows, to wit (p. 239) :

> " In view of all this, the statement by the commissioners in the bond that it is issued ' in pursuance to the vote of the electors of Anderson county of September 13, 1869,' is equivalent to a statement that ' the vote ' was a vote lawful and regular in form, and such as the law then in force required in respect to prior notice."

This recital, therefore, of the election in this Wilkes county bond is a recital of an election under sections 1996 to 2000 of the Code, and is conclusive in favor of the *bona fide* holders of these bonds, as was held in the said case of *Anderson County vs. Beal, supra.*

Sections 1996 to 2000 of the Code do not violate Article 5, Sections 6 and 7, of the Constitution as to "Special purpose," "Special object" or "Special approval" of the General Assembly.

Said Section 6 and 7, Article 5, of the Constitution are as follows :

SECTION 6. "The taxes levied by the Commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

SECTION 7. "Every act of the General Assembly levying a tax, shall state the special object to which it is to be applied, and it shall be applied to no other purpose."

It was objected by the state court in the case of *Commissioner vs. Call, supra*, and in *Commissioners of Stanley County vs. Snuggs*, 121 N. C., 394, 400, 401, cited in the *Call Case*, p. 323, that these provisions of the Code are a general act, and as such violate Article V., Section 6 and 7, of the constitution, which provides, in substance that taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner as the state tax, and shall never exceed the double of the state taxes, except for a special purpose, and with the special approval of the General Assembly, stating the special object to which the tax shall be applied.

(a) **In the present case, however, there is not a word or a syllable in this record to show that the county tax necessary for**

these bonds would exceed double the state tax; therefore, the question does not arise.

(b) **If, however, it had been shown in the record in this case that the county tax for these bonds might exceed double the state tax, then these bonds are, nevertheless, valid:**

First, because the Code does not violate the provisions of Article V., Section 6 and 7, above referred to. The constitution only requires that the legislature give special approval to the special purpose for which any tax is levied in excess of the rate named, but such special approval may be given to all the counties, as well as to any one county, the object of the provision of the constitution being to require the special assent of the legislature to the special purpose. If the rate referred to in Article V., Section 6, is to exceed the double of the state tax, this section requires the legislature to specify the special purpose for which it may so exceed the state tax. The legislature could not authorize such excess by an act, general or special, which only named county purposes generally, and did not specify the special or particular purpose, but it is not necessary that the legislature should in each instance specify by name any particular county or counties. The specification required is only a specification for a special purpose. Legislative authority to subscribe for the stock in a railroad company and issue bonds in payment of such subscription is a special purpose within the meaning of this section, and so the sections of the Code, 1996 to 2000, being the act of April 10, 1869, do specify the special purpose for which the tax is to be levied. It is not necessary to name by name each particular

county. If these sections of the code had provided that the county commissioners of the county, A, B, C, D, etc., naming all the counties in the State, should have power to subscribe for stock in any railroad company, etc., obviously this would be good, for the very Section 6, Article V., of the constitution referred to, contemplates that such taxes may be levied by all "the several counties" of the state. The constitution does not say that any special act is required, but only requires that the purpose be specified, and that the tax and the purpose have the special approval of the General Assembly.

The propositions of the Supreme Court of North Carolina on this point seems to be, in effect, that if the legislature passes a special act for each county in the state; that is to say, ninety-five acts, each act exactly alike, except that one act applies to one county and another to another, and so on through all the ninety-five acts, the legislation is good; but if the legislature, instead of doing this, enacts precisely the same act and says that this act shall apply to all counties in the state, then such an act is bad. Such a view is, of course, unsound, and, if that be the view of the state Supreme Court, the federal courts cannot be expected to follow it as to negotiable bonds issued before such state decision was made.

AND, SECOND, *however this point may be decided, a ruling one way or the other would not invalidate these bonds. A bond may be a valid obligation, although there is not sufficient tax to pay it.*

Such bonds could be paid by as much tax as could be levied, and, if at any time the legislature did pass a special act giving its special approval to the levy of a further tax, then the defect of a lack of power to tax would be removed, if such defect existed. Therefore,

on this point, the objection raised by the Supreme Court of North Carolina must fall. That there may be bonds which are valid, although there is a tax-rate limit, is well settled. See *United States vs. Macon County*, 99 U. S., 582. Article V., Section 6 of the constitution of North Carolina is a mere limitation upon the tax rate, such as was involved in this case of *United States vs. Macon County*, just cited.

FURTHERMORE, THIRD, *even if there be this tax-rate limit in Article V., Section 6 of the constitution of North Carolina, that is a mere limit. It does not appear as a matter of law on the face of the constitution, or on the face of these sections of the code, or on the face of these bonds, that in the instance of these particular bonds of Wilkes county the tax-rate limit would be exceeded. Whether or not this tax-rate limit would, as a fact, be exceeded, is a matter in pais, of which the holder of a negotiable bond, like the bonds in question in the present case, is not bound to take notice.* Moreover, as above stated, there is no proof in the present case that the county tax for these bonds would exceed double the state tax.

Erroneous Construction of the Word "COMPLETION" in Section 1996 of the Code, by the Supreme Court of North Carolina in its Late Decision in the *Stanly County Case*, 121 N. C., 394, 1899.

The Supreme Court of North Carolina, at this late day, in *Commissioners of Stanly County vs. Snuggs*, 121 N. C., 394, has taken a very narrow view of the word "completion." It has undertaken to say that these sections of the Code refer only to a railroad which had been begun, and that the word "completion" is not

synonymous with "construction," but that the language here requires that there must have been an unfinished road.

The court went further, and held that there must have been a road unfinished *at the time of the adoption of the constitution*, April 24, 1868, in order that these sections of the code might have application. This interpretation of the word "completion," we submit, is not the correct one.

It seems obvious that it is used as synonymous with the word "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution as respects the issue of state railroad aid bonds. Article V., Section 4, of the constitution prohibits the issue of State railroad aid bonds, "except to aid in the completion of such railroads as may be *unfinished at the time of the adoption of this constitution.*" Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words—namely, "unfinished at the time of the adoption of this constitution." On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there.

Erroneous Construction in the *Stanley County Case* by the State Supreme Court of the Words "any Railroad in which the CITIZENS OF THE COUNTY MAY HAVE AN INTEREST," **see said Section 1996 of the Code.**

The Supreme Court of North Carolina held that the words of Section 1996 of the Code, "the citizens of the county may have an interest," do not mean exactly

what they state, but hold that they require that the county, *as a county*, shall have a *pecuniary* interest in the railroad, in order that Section 1996 may apply to it. On this point it seems only necessary to state that no such words occur in Section 1996. This construction by the Supreme Court of North Carolina takes out the words "*the citizens*," and inserts the word "*pecuniary*," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit: "Any railroad in which the county has a pecuniary interest." A mere statement of such a distorted construction of this language of the code is enough to refute any such construction. Here, too, again we may call the attention of this Court to the language of Article V., Section 6, of the constitution of the state of North Carolina when it was dealing with the question of the right of the State to issue railroad aid bonds. There it refers to a railroad "in which the State has a *direct pecuniary interest*." This section 1996 of the Code was adopted about one year after the said Article V., Section 6, of the constitution. Doubtless the legislators had before them this provision of the constitution, or, at least, were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the State Constitution as to State Railroad Aid bonds shows that it had a different purpose from that of the Code (§§ 1996–2000).

What is now Section 5 of Article V. of the constitution was originally reported to the Constitutional Convention of 1868 by the committee on finance as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually" (Journal, p. 354).

An amendment was proposed as follows:

"And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads and other works of internal improvement as are unfinished, and in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a mojority of those who shall vote thereon" (Journal, p. 354).

This proposed amendment was further amended as follows:

"Mr. Tourgee moved to amend by striking out 'are' in the fifth line and inserting 'may be;' insert after the word 'unfinished' in the fifth line '*at the time of the adoption of this constitution.*' Strike out 'and' in the fifth line and insert 'or.' This amendment of Mr. Tourgee's was accepted, and the proposed amendment, as amended, was adopted (Journal, p. 354).

On pages 85 to 90 of the convention journal is a report made January 29th, 1868, by the Treasurer of the State to the President of the convention as follows:

"SIR—I have the honor, in response to the resolution of your honorable body requesting me to furnish the convention a 'statement of the indebtedness of the State, to what parties or sources, what amount to each, what is the amount of her endorsement for railroad or other improvements, what further endorsement of railroad bonds she is directed to make under any existing law or regulation, and, when passed, what property, or assets, or securities, said State holds for or on account of said indebtedness, what amount of stock the State holds in the several corporations of this State, and

what amount of dividend or interest she receives annually from each source.' " * * *

The report of the Treasurer shows that, prior to the meeting of the convention, the State had undertaken to issue its bonds in aid of certain railroads, and that, under the statutes then existing, the State was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds, and the State owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to Section 5, Article V., of the Constitution above quoted was designed to enable the State, *without a vote of the people*, to carry out its contracts already entered into on railroads, &c., already then begun and to protect its interests in the railroads, &c., already begun. *With a vote of the people* the State was allowed to aid railroads without restriction. As the Constitution, Article VII., Section 7, did not allow counties to incur any debt in any case (except for necessary expenses) without a vote of the people, the reason for the provision as to *unfinished* railroads in case of State aid, did not apply to counties, and was purposely omitted in the Act of April 10, 1869 (now Sections 1996–2000 of the Code).

This view is supported by the following decision rendered by the North Carolina Supreme Court in 1869, the year following the Constitutional Convention.

In *Galloway vs. Chatham Railroad Company*, 63 N. C., 147, the suit was to enjoin an issue of State bonds in aid of a railroad company. The court held that the bonds were unauthorized under the provisions of the constitution. In the course of the opinion (PEARSON, C. J., giving the same) the court say, with respect to the restrictions on the power of the state to

incur debt, speaking of the debt existing at the time of the adoption of the constitution of 1868 (p. 153):

"It will be found that most of the public debt was incurred in three modes: 1st, by subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock, the state becoming a member of the corporation; this is the heaviest item, and amounts to say eight millions of dollars; 2nd, by issuing bonds of the state and exchanging such bonds for a like amount of the bonds of the corporation, the state not becoming a stockholder and taking collateral security of more or less value; this is the next heaviest item and amounts to about three millions of dollars; 3d, by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

"These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state and tarnish her honor and her reputation for good faith.

"* * * (p. 155). The suggestion that the credit of the state was given by this statute to aid in the completion of an *unfinished railroad* was not strongly urged on the argument, and indeed it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word '*has*' is in the present tense. The exception is obviously confined to roads in which the state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference between the language of the Constitution as to State aid bonds and the language of the Code as to county aid bonds. The Constitution says "*has*," and note the comments of the court on the present tense. The Code says "*may have*," &c., &c.

Of course such of these decisions of the Supreme Court of North Carolina as were rendered after the bonds in question in the present case were issued are not binding upon this Court, and it is both the right and duty of this Court to construe this language of sections 1996–2000 according to their natural and proper meaning.

Within the meaning of Section 1996 of the Code the citizens of a county have an interest in any railroad running into or through the county, and this section would be confined accordingly to *such* railroads.

OUR SECOND PROPOSITION *as to the Code is that even if the language of these sections of the Code—1996 to 2000—is to speak from the time of their earliest adoption—to wit, April 10, 1869—and if these sections are not prospective in their operation, they, nevertheless, authorized the issue of the bonds now in suit by Wilkes County, as they were issued in aid of a railroad which had been begun before April 10, 1869, and was then not completed.*

There cannot be the slightest foundation in this language of section 1996 of the code for saying that it applies only to the completion of a railroad which had been begun *when the constitution of 1868 was adopted.* There is not a word or a syllable in the said provisions of the code lending any support to any such view. The utmost that could be claimed would be that these sections applied to the completion of a railroad which had been begun at the time these sections were adopted, which was in 1883, or, at the very earliest, April 10, 1869. Even if this earlier date, April 10, 1869, be the one selected, then it is, nevertheless, true that these sections of the code would apply to and authorize these Wilkes county bonds, since this railroad might be a railroad referred to in these sections,

and the sections might properly speak of the subscription to the stock of this railroad company as necessary to aid in the completion of this railroad. This company had been chartered by the ordinance of the Constitutional Convention, ratified March 9, 1868, over one year before the passage of these code sections. Section 1 of the ordinance of March 9, 1868, authorized the construction of the *main line* into Wilkes County. A glance at the map will show this. The line into Wilkes County was not a *branch* as erroneously contended in the brief of Judge AVERY. Forsyth county, as shown in the two Forsyth county cases above quoted, had in 1868 issued bonds to aid in the construction of this road, such bonds being ordered issued at the June term, 1868, of the board of commissioners of Forsyth county. This railroad, then, was a railroad projected and begun and under construction at the time of the adoption of these sections of the code, April 10, 1869. Obviously, therefore, these sections of the code apply to this issue of bonds by Wilkes county to aid "in the completion" of such railroad.

The County is Estopped by the Recital in the Bonds.

Inasmuch, however, as these sections of the Code—1996 to 2000—gave lawful authority to issue bonds to aid in the completion of a railroad, there was, under the familiar doctrine, *power to issue bonds;* and whether or not all of the facts existed, such as that the railroad had been begun and was unfinished at the time of the adoption of this act, April 10, 1869, is a matter *in pais* to be determined by the county commissioners before the bonds are issued; and inasmuch as they have

issued these negotiable bonds, and they are in the hands of *bona fide* holders, such holders are entitled to assume that they have been issued under and pursuant to the power which existed. This is under the familiar rule that, if upon any state of facts there was lawful authority to issue negotiable paper, then the holders of such negotiable paper are entitled to assume that such facts existed.

No "policy" of the State against Railroad Aid Bonds. Provision as to "unfinished" railroads applies only in case of State aid bonds.

The learned counsel for the county apparently attempts to make an argument that there was a *policy* of the State of North Carolina, as evidenced in the constitution of that state, adopted in 1868, against issuing railroad aid bonds by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this—that no State bonds should be issued to aid any *new* railroads, unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. *As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution.* A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new

railroad, and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads so far as respects county aid, and no such distinction existed in the Code, or in any other provisions of the statute.

Even the learned counsel for the county would admit that if there had been a special act authorizing the issue of these bonds, or if the act of February 20, 1879, had been properly enacted by the legislature, there would have been clear constitutional power to issue these bonds. How, then, can the learned counsel seriously argue that the constitution of the state of North Carolina has adopted any policy as against the issue of county railroad aid bonds.

Further, as to Code Sections 1996-2000. These sections give power to issue the bonds. The objections of the County further answered.

The learned counsel for the county says, in substance, in regard to the Code provisions, Sections 1996 to 2000, originally adopted April 10, 1869, these are to be construed the same as the provisions in the constitution of the state, Article V., Section 4, in regard to the issue of railroad-aid bonds by the state, stating: "It was deemed a part of the policy of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun." There is not anything in the Code or in any of the statutes or in the Constitution of the State which supports any such

view. The significant language of Article V., Section 4, of the constitution of the state, as applied to *state* railroad-aid bonds, is purposely omitted when the constitution deals with *county* bonds in Article VII., Section 7, and is purposely omitted from the said provisions of the Code. The Supreme Court of North Carolina, in *Commissioners of Stanly vs. Snuggs*, 121 N. C., 394, committed an obvious and glaring error in holding that the same provision applied to a *county* as to a *state*.

We may note in passing that the learned counsel for the county, in dealing with Article V., Section 4, of the constitution of North Carolina in connection with his argument in respect of code sections 1996 to 2000, would omit the significant words "*a direct pecuniary*," so that he would make a clause in that section, as respects state aid, read "a railroad which may be unfinished at the time of the adotion of the constitution, or in which the state has *an interest*," whereas that section of the constitution really reads, "except to aid in the completion of such railroad as may be unfinished at the time of the adoption of this constitution, or in which the state has a *direct pecuniary* interest, unless the subject be submitted to a direct vote of the people of the state," etc. The claim of the learned counsel—that a "direct pecuniary interest" is required in the case of *county* bonds—is erroneous, and the decision of the Supreme Court of North Carolina in the case of *Stanly County vs. Snuggs*, 121 N. C., 394, is plainly erroneous.

The learned counsel for the county speaks of the case of *Stanly County vs. Snuggs*, 121 N. C., 394, and says, in substance, that in that case the words in code section 1996, act of April 10, 1869, "in the completion of any railroad in which the citizens of the county may

have an interest" were construed as speaking of railroads *unfinished* at the time of *the passage of the act or the adoption of the constitution.* The fact is, the court, in the case of *Stanly County vs. Snuggs*, held that those words in the code were retroactive and went back to the time of the adoption of the constitution (April 24, 1868), although there was not a word or syllable in the said Code, or in the act of April 10, 1869, to indicate that they were intended to have any such rotroactive effect. The learned counsel continues (p. 19, bottom) :

> "It was deemed a part of the *policy* of the state to place its subdivisions under the same restrictions as the state, by preventing them from aiding in the completion of a road not then begun."

The fact is that there was no "policy of the state" to prevent a county from aiding in the completion of a road not begun at the time of the adoption of the constitution, or at the time of the passage of the act of April 10, 1869, nor even to prevent the state from aiding such road. The restriction was that a county should not aid any road begun, or not begun, unless by a vote of the people. The restriction on the part of the state was less than this, to wit, the state was permitted, *without* a vote of the people, to aid any railroad which had been begun, and was permitted to aid *any* railroad (begun or not begun) *with* a vote of the people.

The learned counsel for the county, would omit from his quotation of Article V., Section 4, of the constitution, the significant words "*a direct pecuniary*" [interest], which apply only to *state* railroad aid *without* a vote of the people, and then goes on seriously to argue that the same direct pecuniary interest is necessary in the case of aid by a county, although neither

the code nor the constitution makes any such provision. The bare statement of such an argument is enough to refute it.

But however this may be, it is obvious from the *Hill* and *Belo cases* that this railroad had been begun before the passage of the act of April 10, 1869.

Furthermore, whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the constitution (April 24, 1868), was a fact *in pais* to be determined by the county commissioners before they issued the bonds, and not a matter with which the holder of these negotiable municipal bonds is concerned.

The Code of North Carolina is one act (Code, Section 3876), and went into operation November 1st, 1883 (Code, Section 3866).

At the end of volume 2 of the Code, at bottom of page 603, *it is declared that the requirements of Sec.* 14, Article 2, of the Constitution of North Carolina, have been complied with in the passage of the Code; and this is also admitted.

The bondholders are not estopped by the recital, on the face of the bonds, that they were issued under the provisions of the act of 1879, *provided it can be shown* that the commissioners of Wilkes county, in ordering the election and issuing the bonds, *acted also* under the provisions of sections 1996 and 1997 of the Code.

It is apparent that they did. They gave notice of exactly thirty days, the time required by section 1997 of the Code; the order speaks of the matter to be submitted as a "proposition," the word used in said section. *Besides, article 21 of the complaint declares that these bonds were, as a matter of fact,* issued under the provisions of these sections, as well as of the charter and the amendatory acts of 1868, 1879 and 1881. And

article 21 of the answer does *not deny* this fact, but merely denies the *legal conclusions* arising from said admitted fact.

So it is admitted that the Board of Commissioners was proceeding under the provisions of sections 1996 and 1997 of the Code, as well as under the *acts set out in the record and under the charter.* If this be true, then the bonds are valid, notwithstanding the recitals in the bonds, provided the Code provisions conferred on the board the power to issue them.

Knox Co. vs. Ninth Nat. Bank, 147 U. S., 91.
Cairo vs. Zane, 149 U. S., 122.
Anderson, &c. vs. Beal, 113 U. S., 227.
See further on this point, *ante*, pp.

But the respondents contend that these sections did not authorize the issuance of the bonds for the following reasons:

I. Because said statutes are not local and special as required by sections 1, 6 and 7 of the Constitution of North Carolina.

The conclusive answer to this is that there is not a particle of evidence of any kind to be found anywhere in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the State tax. But, further, under the decisions of the Supreme Court of North Carolina this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing and binding obligation *paid.*

"The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal authority to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual"

(Cromartie vs. Commissioners, 87 N. C. Reps., on p. 140*)*.

And in *Herring vs. Dixon*, 122 N. C., on page 423, the Supreme Court of North Carolina again distinguishes between the power to contract a valid indebtedness without special legislative sanction and the power to levy a tax to pay said indebtedness when it says: "In *Vaughn vs. Commissioners*, 117 N. C., 429, while it was held that the commissioners could *incur a debt* for necessary expenses, without a vote of the people, it was not held that they could *levy a tax* in excess of the constitutional limit to pay it without special approval of the legislature."

So under the rulings of *Cromartie vs. Commissioners* and of *Herring vs. Dixon* the commissioners have the right to contract a valid debt without a special act, but only the process of collecting its payment would be affected by section 6, article 5, of the Constitution.

But this argument is useless, as the record contains no evidence whatever, that the payment of this obligation by the county will require a tax exceeding double the State tax.

Subscriptions to railroads, under General Statutes similar to section 1996, have been upheld by the Supreme Court of the United States:

"Where a State law confers a general power on a county to subscribe to the stock of any railroad in the State for any amount not exceeding $100,000, the county may subscribe to the stock of two railroads $100,000 each" *(Chicot County vs. Lewis*, 103 U. S., 164*)*.

In *Davies vs. Huidekoper*, 98 U. S., 104, the court upholds a subscription under a General Statute of Missouri almost identical in language with section 1996.

The following are sections 1996 and 1997 of the Code of North Carolina:

Section 1996 of the Code of North Carolina.

"The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina.

"The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

Re the "interest of the citizens of the county."

In addition to what we have already said on this subject we add the following:

The appellants further contend "that said sections of the Code failed to authorize the issue of said bonds, because said North Western North Carolina Railroad

was not, within the meaning and proper construction of section 1996 of the Code, one in which the citizens of the County of Wilkes had an interest."

Aside from the common sense of the matter, the grammatical construction of section 1996 forbids the interpretation put on it by appellants; to wit, that, before a vote could be taken by the citizens of Wilkes County, the said citizens must have a direct pecuniary interest in the road; that is, must be stockholders in the road. The words of the statutes are "in which the citizens of the county may have an interest."

The words are not "citizens of the county may have an interest," or "certain citizens," but "*the* citizens of the county."

So, if pecuniary interest is meant, *every citizen* of the county must have stock before a county subscription could be voted, which is a *reductio ad absurdum*. But, if this was meant, the statute should have read, "in which the citizens of the county may have interests." So that, assuming that this interest means a pecuniary interest, every citizen of the county must have stock, and that stock must be "an interest," or, in other words, that stock must constitute only one interest, one block of stock, owned in joint ownership by every citizen of Wilkes County—a palpable absurdity.

It is clear that the interest spoken of is the interest that the citizens of the county might have in any public improvement.

"What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has already been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to

construct it from legislative grant" (*Olcott vs. Supervisors*, 16 Wallace, 678).

Re the "completion" required by the Code.

It is also objected by the attorney for the County Commissioners, "Nor was the subscription made necessary to aid in the completion of the same" [that is, the railroad].

The North Western North Carolina Railroad was begun to be built in October, 1868, and was finished to Winston, N. C., in 1872 or 1873; and, on November 6th, 1888, when the bonds were voted, work was in progress on that part of the road from Winston to Wilkesboro. This fact is shown by affidavits in the record.

It will be admitted, however, by appellants' solicitors. Indeed, it is a matter of public notoriety.

See page 79 of record.

The sections 1996 of the Code were first enacted into law April 10th, 1869, about six months after the work had been commenced on the North Western North Carolina Railroad.

The statute of April 10th, 1869, was re-enacted in Battle's Revisal and went into operation January 1st, 1874; it was again re-enacted in the present Code of North Carolina, and went into effect November 1st, 1883. So that, if the word "completion" be construed in its strictest sense, these bonds voted for on November 6th, 1888, were voted in aid of the completion of an unfinished road, of a road upon which the work of construction was going on on the very day these bonds were voted by the citizens of Wilkes County.

"No reasonable construction of this act will require that the road to be aided should be actually built be-

fore the county was authorized to give it aid. That theory would, no doubt, add greatly to the security of the county and would relieve it from many of the perplexing questions which so commonly arise. If, however the road were actually built, no aid would be needed in its construction. The aid might, in that event, be useful to its stockholders, or might relieve it from embarrassments, but a road which is built can neither need nor receive aid in its construction. That is a fact accomplished" *(Kenicott vs. Supervisors*, 16 Wallace, 452*)*.

These objections to the giving of the power to the board to issue the bonds by sections 1996–2000 have been made by the county in Article 21 of their answer.

Another defense has been urged in and sustained by the State Court, to wit: That the provisions of section 1996 refer to only those roads that were *unfinished in April, 1868, the time of the adoption of the constitution of 1868.*

"This reasoning leads us to the still farther conclusion that, at the time when the act of 1868–9 was brought forward in the Code, Section 1996, and the four succeeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868" *(Commissioners vs. Snuggs*, 121 N. C., on page 403, 1897*)*.

This was first decided in 1897 and is one of the most astonishing legal solecisms into which so able a court ever fell. The statute of April 10th, 1869, section 1996 of Code, made no reference to the Constitution of 1868, nor to any other point of time in the past. Every word in section 1996, denoting tense, is in the future tense, and the Code went into effect November 1st, 1883.

It is an universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary.

"No statute should be given a retrospective operation unless its words expressly require such construction" *(State vs. Littlefield*, 93 N. C., 614*)*.

What words in section 1996 require that its operation be referred back to April, 1868, fifteen years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? Upon the same false principle of construction (a principle that can find no support in any book ever written on the suject), if a section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868, thirty-two years before its enactment! But this very principle has been passed on by the Supreme Court of the United States in *James vs. Milwaukee*, 16 Wall., 159. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized; and this court held that companies thereafter organized were intended to be included, and the statute was applicable to them, as well as those then in existence. This court said (pp. 160, 161):

"The defendant in error insists that the power conferred was confied to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case, there was no word denoting the future tense, no "shall," as in section 1996, but the only words used were the adjectives, "incorporated and organized."

The cases relied on by the county's solicitors, concerning the power to tax, being conferred by special act, in answer to the contention on the part of complainants, that the commissioners had the power to

issue the bonds under the sections of the Code, set out above, can have no application to a case of the kind at bar. The Supreme Court has said, in a late case, *City of Charlotte vs. E. D. Shepard & Co.*, 122 N. C., page 603, that "where such a corporation," speaking of a municipal corporation, "has thus acquired the right to create a debt, and issue the bonds, *this power carries with it*, the power to levy the taxes necessary to pay said bonds, and the accruing interest thereon" *(Ralls vs. County Court*, 105 U. S., 733; *U. S. vs. New Orleans*, 98 U. S., 381*)*.

These sections of the Code, 1996 and 1997, are as much the law of North Carolina as any other sections of the Code are; they are as much the law as the Constitution itself is. In the *Stanly County case*, the Circuit Court of Appeals, in 1899, held itself bound by the decision of the Supreme Court of North Carolina *(Commissioners vs. Snuggs*, 121 N. C., 401*)*.

In the *Snuggs Case* the Supreme Court upheld the sections of the Code referred to, deciding, however, that they did not apply, the road not being an unfinished road, and the citizens of the County not having an interest in the same.

Estoppel of the County by the recitals in the bonds.

In the *Snuggs case* there was no pretense that any bondholder was a party, it being, as we contend, an *ex parte* proceeding. If any bondholder had been a party, the decision would have been different, because, in the body of the bonds issued by *Stanly County*, there was a recital that they were issued in pursuance of Sections 1996, &c., of the Code. This shows the corporate

authorities acted with these provisions of the Code before them, and that they passed upon all questions left for their determination, as said by Justice BREWER in his opinion in *The Mercer County Case*, on page 601 of the volume 170 U. S. R. It shows these corporate authorities were acting in good faith, and wanted to perform their duty according to law.

On page 307, Vol. 87 Federal Reporter, in the case of *Township of Ninety-six vs. Folsom*, the Circuit Court of Appeals, speaking through Judge JACKSON, says:

> "It will be observed, from the inspection of these bonds, that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with, authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belong to the authorities, who were authorized by the acts of the legislature to issue the bonds."

After what was stated by the Supreme Court of the United States in the present case, with reference to the *Hill* and *Belo cases*, and with reference to the validity and continued existence of the said ordinance of 1868, some portions of the foregoing argument might well have been omitted from this brief. It has seemed best to us, however, after reading the brief of the learned counsel on the other side, to make such argument here in full, not omitting those parts which relate to the questions on which the Supreme Court of the United States has already given its opinion, namely,

the validity and continued existence of the said ordinance.

This Court, therefore, should hold the said bonds valid, and affirm the judgment of the Circuit Court.

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